

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

January 30, 2007 Session

STEPHEN WILLARD GREENE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Blount County
No. C-15137 D. Kelly Thomas, Jr., Judge

No. E2005-02769-CCA-R3-PC - Filed April 25, 2007

The petitioner, Stephen Willard Greene, appeals the trial court's denial of his petition for post-conviction relief. The defendant contends that he is entitled to post-conviction relief from his 2000 conviction for rape of a child and resulting twenty-five year sentence because he received the ineffective assistance of counsel at trial. The state argues that the appeal should be dismissed because it was not filed within the one-year statute of limitations. We hold that the petition was untimely, and we dismiss the appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

Robert L. Vogel, Knoxville, Tennessee, for the appellant, Stephen Willard Greene.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Robert L. Headrick, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner was originally convicted by a Blount County jury of rape of a child, a Class A felony, see T.C.A. § 39-13-522, and incest, a Class C felony, see T.C.A. § 39-15-302. These convictions arose from allegations that the petitioner raped his minor stepdaughter, T.M. The state's evidence at trial consisted of testimony from the victim, two people to whom the victim reported her allegations, and a doctor who performed a physical examination of the victim. The doctor testified that the victim's hymen and rectum were torn. The petitioner and two of his relatives testified for the defense at trial, and their testimony was largely focused on the victim's character for untruthfulness and the fact that the victim and petitioner fought shortly before the victim made her allegations against the petitioner.

The trial court sentenced the petitioner to consecutive terms of twenty-five years for rape and six years for incest. On direct appeal, this court affirmed the petitioner's rape conviction but reversed the incest conviction on the ground that the state had failed to elect an offense as to that charge. State v. Stephen Greene, No. E2000-02616-CCA-R3-CD, Blount County (Tenn. Crim. App. Apr. 18, 2002). We remanded the case for a new trial on the incest charge, and according to the state and petitioner, the trial court subsequently dismissed that charge upon a nolle prosequi. Meanwhile, the petitioner sought permission to appeal his rape conviction to the Tennessee Supreme Court, which denied him permission in an order filed on October 7, 2002.

The petitioner filed a petition for post-conviction relief on August 13, 2004, alleging, among other grounds, that he received the ineffective assistance of counsel at trial. At the post-conviction hearing, the petitioner testified that both the prosecution and his trial counsel knew of the existence of evidence relating to the sexual behavior of the victim that was not introduced at trial. He explained that his sister, Lisa Tucker, had observed the victim fondling her daughter and had made a complaint to the Department of Human Services (DHS). He said DHS investigated the complaint against the victim and had come to the petitioner's house to interview the victim. The petitioner said he told his trial counsel about the DHS investigation and Ms. Tucker's potential testimony. He said trial counsel "didn't really say anything" about Ms. Tucker's testimony. He said he also told trial counsel about two other witnesses who could testify about the character of the victim. He said he told counsel that his mother, Ella Greene, could testify that she observed the victim telling the victim's younger sister that the victim would have to have sex with several boys in order to be initiated into a gang she wanted join. He said he also told counsel that his friend Kenneth McCollum, who often visited the petitioner's family, could testify as to the character of the victim for untruthfulness. The petitioner said that he expected these witnesses to be called at trial but that they never were. He said that he asked counsel about them before the end of trial but that counsel told him the witnesses were not needed.

The petitioner testified that he learned during the trial that the prosecutor was talking to witnesses in front of jurors during a trial recess. He said he informed his trial counsel. He said that counsel informed the judge about this but that counsel did not raise any objections to the prosecutor's conduct. The petitioner said he also learned that the state told the victim she would receive money if the petitioner was convicted. He said he told trial counsel but trial counsel did nothing about it. He said he also wrote letters to counsel after his conviction regarding his sentence. The petitioner maintained that he was sentenced under the wrong law and that under the applicable law, he should have been sentenced to fifteen years at thirty percent, rather than the sentence he received of twenty-five years at one hundred percent.

On cross-examination, the petitioner testified that he never had problems meeting with counsel before the trial and that he often met in counsel's office. He said that two or three days before trial, counsel informed him that there were things missing from the discovery he received from the state. The petitioner said that he asked counsel about the DHS file on the victim but that counsel told him it was not in his discovery. The petitioner acknowledged receiving a plea offer of six years for incest.

The petitioner's trial counsel testified that he and the petitioner had a good working relationship and that he spent several hours working on the petitioner's case before the trial. He said his work on the petitioner's case included looking for experts, filing motions, and talking to anyone who could possibly help the petitioner's case. He said he "went over everything" with the petitioner, including potential witnesses. He recalled talking to the petitioner's mother on several occasions, but he did not recognize Kenneth McCollum's name. He said that although the petitioner's mother was willing to testify, he did not call her to testify because he was worried she would not be a strong witness. He was certain that he talked to Lisa Tucker, but he could not remember if he first talked to Ms. Tucker before or after the petitioner was convicted. Counsel said that he discussed the trial witnesses with the petitioner and that "[t]here shouldn't have been any surprises" regarding witnesses. He said the petitioner did not complain to him during trial about which witnesses were or were not called.

Counsel testified that the state did not disclose before the trial the DHS file stemming from Ms. Tucker's complaint against the victim. He said he obtained the report after the trial and subpoenaed a DHS caseworker to the motion for a new trial hearing. He said that the report stemmed from an allegation that the victim performed fellatio on Ms. Tucker's son and some other form of molestation on Ms. Tucker's daughter. In the motion for a new trial and on appeal, counsel raised the issue of the state's withholding the exculpatory DHS file. Counsel testified that he was aware before the trial that exculpatory evidence relating to the victim's prior sexual conduct might exist. He said that when he did not receive any such evidence in response to his discovery motion, he did not take any action to request the DHS file until after the petitioner was convicted. He said he did this because the petitioner's family did not want Ms. Tucker's son to have to testify at the trial and that, to his recollection, the allegations against the victim contained in the DHS file would not have been admissible without the testimony of Ms. Tucker's son. He said he made a strategic decision not to raise the state's withholding of the DHS file until after the trial. He said that after the petitioner was convicted, the family felt comfortable raising the issue of the allegations of sexual misconduct against the victim. Counsel said that Ms. Tucker's son was never made available to him for questioning before the trial and that he would have called any witnesses the petitioner wanted him to call.

Counsel testified that he never saw or heard of prosecutors talking to witnesses in front of jurors but that the petitioner did inform him that one of the state's witnesses was talking about the case in front of potential jurors. He said that he brought this to the court's attention and that the trial judge questioned potential jurors about this. Counsel also recalled the petitioner's informing him that the victim may have received promises of financial gain from the state. He said he inquired into this by contacting the prosecutor and DHS but that all he discovered was that the victim had been informed of benefits that were available to children in state custody, such as educational expenses.

The petitioner's sister, Lisa Tucker, testified that she first saw the victim behaving inappropriately with her son when the children were about three or four years old. She said she saw the victim performing fellatio on her son one day while the victim was visiting Ms. Tucker's family in Alabama in the late 1980s. She said she observed the victim behaving inappropriately with her

son on several occasions throughout the years that followed. She said she tried to keep the victim and her son apart to prevent inappropriate behavior. She said that one day in 1994, she saw the victim's sister with her hands inside Ms. Tucker's daughter's pants. She said this incident compelled her to report the behavior of the victim and the victim's sister to DHS.

Ms. Tucker testified that she talked to the petitioner's trial counsel before trial and told him that there should be records somewhere of a DHS investigation of the victim. She said that she never objected to counsel using this evidence at trial and that she tried to get a copy of the case file herself but was unsuccessful. She said counsel told her the evidence would hurt the petitioner's case. Ms. Tucker said she also had receipts that showed that she and the victim's mother, who the victim claimed was present when the petitioner raped her, were shopping on the evening the victim was raped. She said she saw the victim the day after and found no marked change in her behavior. Ms. Tucker said that she had a tape recording of the victim's telling Ms. Tucker's daughter that she hated the petitioner and would "get him" one day.

The state recalled trial counsel, who testified that Ms. Tucker probably did meet with him in his office before trial. He said he did not remember Ms. Tucker telling him that she saw the victim performing fellatio on her son. He said Ms. Tucker told him that she learned of the incident from her son. Therefore, counsel said, her son would have to testify at the trial in order for the evidence to be admissible. He said that while he was aware of sexual allegations against the victim before the trial, he learned most of the details of the allegations after the petitioner was convicted. Counsel admitted that he could have subpoenaed the DHS caseworker to bring the DHS file to court before the trial but did not. He said he had not previously heard about the existence of an audiotape on which the victim made statements about "getting back" at the petitioner.

The trial court denied the petition, finding that Ms. Tucker's testimony was not credible and that the petitioner's allegations for post-conviction relief were without merit. In the present appeal, the petitioner contends that the trial court erred in dismissing his petition because he did receive the ineffective assistance of counsel at trial. The state argues that this court has no jurisdiction to hear the present appeal because the petition for post-conviction relief was filed outside the statute of limitations. The state further argues that the trial court did not err in finding that the petition was without merit.

As an initial matter, we note that the petitioner filed his notice of appeal to this court on December 6, 2006, more than thirty days after the trial court's order dismissing his petition for post-conviction relief, which was filed on November 3, 2006. Thus, the notice of appeal was not timely. See T.R.A.P. 4(a) (requiring notice of appeal in an appeal as of right to be filed within thirty days of the date of entry of the judgment appealed from). In the interest of justice, we may waive the timeliness requirement and proceed to analyze the issues raised by the parties. Id. The petitioner's problem in this appeal, though, is more fundamental.

The state contends that this court lacks jurisdiction to hear the petitioner's appeal because the petition was filed outside the one-year statute of limitations for post-conviction petitions.

Tennessee Code Annotated section 40-30-102(a) provides that a person must petition for post-conviction relief within one year of the date of the final action of the highest state appellate court to which an appeal is taken. The statute emphasizes that “[t]ime is of the essence of the right to file a petition for post-conviction relief . . . , and the one-year limitations period is an element of the right to file such an action and is a condition upon its exercise.” T.C.A. § 40-30-102(a). The statute further states that “[n]o court shall have jurisdiction to consider a petition filed after the expiration of the limitations period unless” certain specifically enumerated and narrow exceptions apply. T.C.A. § 40-30-102(b).

In the present case, the petitioner mailed his petition from the Department of Correction on August 11, 2004, and it was received in the clerk’s office on August 13, 2004. The date of the final action of the highest appellate court to which an appeal was taken was October 7, 2002, when the Tennessee Supreme Court denied the petitioner’s application for permission to appeal his rape conviction. Thus, the petitioner did not meet the one-year deadline for filing a petition for post-conviction relief. While the petitioner did not address the statute of limitations question in his brief, he noted in oral argument that if the statute of limitations were tolled until the resolution of his incest case, which judgment was reversed and remanded by this court on appeal, his petition would be considered timely. However, the petitioner cites no authority that supports the proposition that the statute of limitations did not begin to run until after the incest judgment was final. In fact, the Post-Conviction Procedure Act requires separate petitions for relief from judgments entered in separate trials or proceedings. T.C.A. § 40-30-104(c). After the petitioner’s incest judgment was reversed and that case was remanded for further proceedings separate from the rape case, the petitioner would have been required to bring a separate petition to challenge any resulting incest judgment.

The petitioner also argued that the state waived its right to use the statute of limitations to bar post-conviction relief because it raised the issue for the first time on appeal. This court has previously noted, however, that Tennessee Code Annotated section 40-30-102 confers “jurisdictional import to the timely filing of a petition” and that “the question of timeliness [must] be resolved before any adjudication on the merits of petitioner’s claims may properly occur.” Antonio L. Saulsberry v. State, No. W2002-02538-CCA-R3-PC, Shelby County, slip op. at 2 (Tenn. Crim. App. Feb. 9, 2004). Thus, even if the statute of limitations was not raised at the trial court level and the trial court treated the petition as timely, we must still dismiss the appeal if we conclude that the trial court never had jurisdiction to consider the petition because the petition was untimely and that due process does not require tolling the statute of limitations. Id. slip op. at 3; see also Raymond Mitchell v. State, No. M2003-02063-CCA-R3-PC, Davidson County, slip op. at 5 (Tenn. Crim. App. Sept. 17, 2004); Kenneth Smith v. State, No. W2003-01618-CCA-R3-PC, Fayette County, slip op. at 4 (Tenn. Crim. App. May 6, 2004).

The petitioner has not argued that this case fits under any of the three exceptions listed in section 40-30-102(b) which permit filing outside the one-year limitations period. The petitioner did contend during oral argument that the statute of limitations should be tolled in his case on grounds of due process. The Tennessee Supreme Court has held that in limited circumstances, the statute of limitations for filing a post-conviction petition should be tolled when “strict application of the statute

of limitations would deny a defendant a reasonable opportunity to bring a post-conviction claim and thus, would violate due process.” Williams v. State, 44 S.W.3d 464, 468 (Tenn. 2001) (citing Burford v. State, 845 S.W.2d 204 (Tenn. 1992)). However, the petitioner has not pointed to any facts that explain the delay in filing the petition and which raise a potential due process concern with regard to the application of the statute of limitations. The record does not indicate that the petitioner was “denied the reasonable opportunity to assert a claim in a meaningful time and manner.” Seals v. State, 23 S.W.3d 272, 279 (Tenn. 2000) (holding that the statute of limitations should be tolled during time that petitioner was mentally impaired). If the petitioner is arguing that he did not file his petition within the limitations period because he thought he could wait until after the resolution of his incest case, then we must note that “ignorance of the statute of limitations is not an excuse for late filing.” Raymond Dean Willis v. State, No. 01C01-9211-CR-00359, Davidson County, slip op. at 4 (Tenn. Crim. App. Oct. 21, 1993).

Because the petition was filed outside the one-year limitations period and because none of the exceptions to timely filing apply in this case, the trial court did not have and we do not have jurisdiction to consider the petition. Based on the foregoing, the record as a whole, and the arguments presented in this case, we dismiss the petitioner’s appeal.

JOSEPH M. TIPTON, PRESIDING JUDGE